UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

RICHFIELD HOSPITALITY, INC.
AS MANAGING AGENT FOR KAHLER
HOTELS, LLC,

Respondent, Case No. 18-CA-176369

and

UNITE HERE INTERNATIONAL UNION
LOCAL 21,

Charging Party.

RESPONDENT'S OPPOSITION TO CROSS-EXCEPTIONS OF COUNSEL FOR THE GENERAL COUNSEL

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ARGUMENT

A. ALJ Locke's Conclusion That Respondent's Actual Proposal Was Clear Does Not Contradict Any of ALJ Steckler's Conclusions (Cross-Exception 3).[1]

Brief background: After the Respondent acquired the responsibility for managing the hotels at issue here, it conducted a market survey, which revealed that many of the hotels' employees were paid well over market scale for their positions. Apparently, the wages were not kept in line with the collective bargaining agreement; instead, they "grow'd like Topsy," without any apparent rhyme or reason or cause. As a consequence, Respondent had "red-circled" certain employee positions and planned to avoid wage increases for those individuals until their wages became more in line with the appropriate scale. Hearing 1 Transcript at 37, 40-41 (testimony of Managing Director of Human Resources Michael Henry). All of this was explained to the Union in preliminary meetings in 2014, and was then reiterated during negotiations in 2015. Any new collective bargaining agreement was therefore going to require more than just planning percentage raises across-the-board. Respondent's last, best, and final offer, presented on March 24, 2015, took into account all of these circumstances.

In any event, the fact that the proposal was not simplistic did not make it "incomprehensible". The CGC repeatedly refers to "thousands of pages of pie charts" in a continuing effort to confuse the issues in this case. There were two separate sets of pie charts. One set was created by classification, derived from the spreadsheet (Hearing 2 Exh. R-2) that Judge Locke concluded communicated Respondent's proposal with "crisp clarity" and Union negotiator Martin Goff admitted to understanding (Hearing 2 at p. 132), and which were attached

[1] Respondent has no objection to cross-exceptions 1, 2, 6, and 10 (correcting counsel's name and certain dates).

to the Respondent's last, best and final offer (Hearing 1 Exh. GC-6; Hearing 2 Exh. R-4, pp. 95-146 of 150; *see also* Hearing 2 Tr. at p. 279-280). A separate set of individualized pie charts were created ***in response to a request from Martin Goff for details about how the Respondent's proposal would affect individual employees***. Hearing 1 Tr. at pp. 119, 163-164, 189, 519-520, 653-654; Hearing 2 Tr. at p. 281-283. *See also* Hearing 2 Tr. at p. 222 (Goff cross-examination: "Q And there were two types of pie charts, weren't there? There were pie charts that were created for individuals: 'Billy Jones, this is your real wage pie chart for your job and your wages.' A That's my understanding. Yes. Q But then there were also by-classification pie charts, correct? A I believe that's correct. Q Right. And it was the by-classification pie charts that were attached to the hotels' last, best, and final proposal. A I don't recollect."). Nobody has concluded or shown that the classification pie charts were "confusing"; the CGC and the Union have just referenced "the pie charts" as an overall category without making the distinction.

Notably, classification pie charts were also part of the negotiations among the ***same*** representatives both for the Union and the Respondent with respect to Textile Care Services, the laundry division that the Board approved as a separate unit. The parties reached agreement quickly with respect to that unit, and the classification pie charts were incorporated by reference into that Agreement. *See* Hearing 2 Exh. R-3. The fact that the same parties reached agreement easily for that unit, and that those negotiations included classification pie charts, proves that the classification pie charts ***that were actually part of the proposal*** were not the problem.

The only difference between the two sets of negotiations is that individual pie charts for the hotel employees were developed in response to Martin Goff's request for details about how Respondent's proposal would affect individual employees. The Union refused to accept the fact that many of its existing members would not get significant raises under the Respondent's

proposal, and continually rejected it. In these proceedings, the Union and the CGC have jumped on the fact that, out of the thousands of documents comprising the ***individual*** pie charts, there were a few minor errors (most of which were promptly corrected), and they set out to confuse the ALJs by lumping all of the pie charts together and feigning failure to understand them, even though the individual pie charts were not even part of the Respondent's proposal. They succeeded in confusing ALJ Steckler, and were less successful in the case of ALJ Locke – hence these Cross-Exceptions. He clearly understood that the Respondent's proposal is not unlawful, but that the Union may have trouble selling it to the employees, at least the ones who are not set to get substantial raises.[2]

Judge Locke acknowledged that he would have to accept Judge Steckler's conclusion that Respondent was in violation of the Act in 2015, but that conclusion did not determine the outcome of the hearing before him:

> My problem here is that, for the first time, we have surface bargaining allegations. I've got to somehow read the Respondent's mind and decide whether there was an intent not to reach agreement. And so what you're saying is that, well, I can assume that there was bad faith because Judge Steckler found bad faith based on the pie charts. And I don't know that. That I don't know, because I haven't reached the decision of – supposing she found a violation, which she did, and supposing that the Board upholds it, then what – how does that affect my decision as to the Respondent's state of mind in 2016. I will have to assume, and I will assume, unless the Board reverses it, that the Respondent violated the Act way back when. But what I'm concerned about is the Respondent's intent during the period covered by this complaint.

[2] It is particularly ironic that the CGC now asserts, incorrectly, that ALJ Locke has somehow contradicted ALJ Steckler's conclusions with respect to the pie charts, considering that it was the CGC that continually insisted on introducing the pie charts in the second hearing. *See, e.g.*, Hearing 2 Tr. at pp. 235-249. Respondent referenced them strictly in the effort to distinguish the classification pie charts from the individual pie charts and explain the derivation of the classification pie charts from the spreadsheet, but the CGC again tried to confuse the issue by introducing the individual pie charts, an attempt Judge Locke denied.

Hearing 2 Tr. at p. 239. Judge Locke correctly found that the spreadsheet was part of the proposal, which could hardly be disputed, and that the spreadsheet was clear. This finding did not contradict anything Judge Steckler found, as flawed as her conclusions were. Judge Steckler failed to perceive the distinction between the classification pie charts and the individualized pie charts, and although her finding that "the pie charts" were not offered in good faith did not specify which pie charts she refers to, she did specifically cite to testimony regarding the ***individualized*** pie charts. *See* Steckler decision at pp. 19-20; *see also id*. at p. 21 (the proposal "did not identify by job, job longevity, but identified each individual and a proposed pay rate").

By contrast, Judge Locke recognized that the Union and the CGC were the ones attempting to obfuscate matters, and he had every right to discount Martin Goff's testimony in that regard. The CGC's statement that Goff's testimony acknowledged only that he was "able to read numbers on a spreadsheet" is insulting to the intelligence of both Judge Locke and the Board. The point of Respondent's "belabored cross-examination" was precisely to prove that Goff's feigned confusion about the substance of the Respondent's proposal, as reflected in the spreadsheet, was just that – feigned. The Union has persistently played dumb in its continuing (and so far successful) effort to convince Board representatives that Respondent is the villain in these negotiations. The CGC's overdramatic assertions that "Respondent's wage proposal remains in a state of uncertainty", and "until Respondent *defines* what its wage proposal is, it *cannot* be understood", are far beyond anything Judge Steckler ever concluded. Judge Locke's conclusions that the Respondent's proposal is clear and that the Union understood it and continues to understand it do not conflict with Judge Steckler's conclusions and are themselves supported by clear evidence.

B. Judge Locke Properly Did Not Rule Unnecessarily on Whether the Impasse Was Precluded by Judge Steckler's Findings, and Collateral Estoppel is Not Appropriately Applied, Because Judge Steckler's Conclusions Are Currently Pending Challenge Before the Board (Cross-Exceptions 4, 5, 7, 8, 9).

The CGC tried to persuade Judge Locke to overtly affirm Judge Steckler's conclusions, but he did not fall into that trap:

> Without doubt, the Board has authority to have one judge decide de novo some factual or legal issues already decided by another judge. That happens on those quite rare occasions when the Board decides to remand a case to a judge other than the one who initially heard it. However, in those unusual instances the Board issues an order specifying that the matter will be heard on remand by another judge. Absent such an explicit conferral of jurisdiction, a judge has no authority either to revisit or undo the holdings of another of the Board's judges.

Locke decision at 49, l. 27-32. Judge Locke was charged with determining whether there was surface bargaining in 2016. In order to make his determination, he considered the parties' negotiations in 2016. It would not have been appropriate for him to rely on Judge Steckler's conclusions to find that the parties had not reached valid impasse, where that finding was not necessary to his own conclusion. He would have overstepped his authority to draw yet additional inferences based solely on Judge Steckler's conclusions, as to which exceptions are pending with the Board.

For the same reason, collateral estoppel is not appropriate here. Collateral estoppel applies "[w]hen an issue of fact or law is actually litigated and determined by a ***valid and final judgment***, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." N.L.R.B. v. Yellow Freight Sys., Inc., 930 F.2d 316, 319 (3d Cir. 1991) (citations omitted, emphasis added). Like the arbitration award in Yellow Freight, which the court ruled did not collaterally estop the Board, Judge Steckler's decision is yet "unreviewed", and therefore not entitled to preclusive effect. For

the same reason, the CGC's citation of Wynn Las Vegas, LLC & David Sackin, 358 NLRB 690 (2012), is unavailing (even apart from the fact that it was issued without a legal quorum). The Board in Wynn had issued a final ruling on the matter being disputed (though even that decision could not be considered "final" until reviewed by a Court of Appeals or the time for appeal had expired). Here, the Board has yet to rule on Judge Steckler's findings and the Respondent's exceptions thereto. Judge Locke would have undermined his own decision if he had based any conclusions on findings that may be reversed. His decision not to apply collateral estoppel was clearly correct.[3]

Similarly, it would not have been appropriate for Judge Locke to include a remedy of rescission of the implemented final proposal, because he correctly declined to make a finding regarding the validity of the impasse, as such a finding would have had to rely on disputed and as-yet-unfinalized conclusions drawn by Judge Steckler. Nor would it be appropriate to add to his conclusions of law those findings which were not necessary to support his ultimate conclusions, and which were based in whole or in part on Judge Steckler's unreviewed findings.

In short, the Board should not ratify the CGC's attempts to persuade Judge Locke to overstep his authority by relying on or reaffirming unreviewed conclusions reached by a previous ALJ.

[3] Meanwhile, the CGC's arguments suggest that, despite the CGC's opposition to Respondent's motion for consolidation of this case with Case No. 18-CA-151245 (Judge Steckler's case), consolidation is appropriate and the CGC knows it. The Board's refusal to do so is incomprehensible.

CONCLUSION

For the foregoing reasons, Respondent Richfield Hospitality, Inc., respectfully requests denial of the CGC's Cross-Exceptions, and dismissal of the Complaint in this case.

Respectfully submitted this 22nd day of August, 2017.

/s/ Anne-Marie Mizel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Opposition to Cross-Exceptions of Counsel for the General Counsel was electronically filed with Region 18 and the Office of the Executive Secretary using the NLRB's Filing System at www.nlrb.gov and was sent to the following via email and regular mail as follows:

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This 22nd day of August, 2017

/s/ Anne-Marie Mizel

Anne-Marie Mizel